(1)

89-1892

No. _____

In The

Supreme Court of the United States

October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD AND FRANK READY, DIRECTOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO STATE SUPREME COURT

JAMES A. BURKE
Post Office Box 9332
Santa Fe, New Mexico 87504-9332
(505) 988-4657

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a state supreme court can refuse to apply 42 U.S.C. §§ 1983 and 1988 on the grounds that the action was "at bottom" based upon interpretation of state law, where the trial court had found federal constitutional violations and where the relief obtained by the prevailing plaintiff totalled half of the attorney's fees awarded by the trial court and vacated by the supreme court; and

2. Whether New Mexico may discourage the filing of civil rights cases in its state courts by refusing to apply 42 U.S.C. § 1988 on the grounds that disposition of companion state claims render the federal claims "unnecessary," where federal courts in New Mexico routinely award fees in such situation.

TOPICAL INDEX

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

1. The State Court has Decided an Important Question of Federal Law in Conflict with Applicable Decisions of This Court 6

2. The State Court has Decided an Important Question of Federal Law which Has Not Been, But Should Be, Settled by This Court 9

3. The State Court has Decided An Important Federal Question in Conflict with Other State Courts of Last Resort 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

U.S. CASES

Arkansas Writers Project v. Ragland, 481 U.S. 221 (1987) 10

Burnett v. Grattan, 468 U.S. 42 (1984) 7

California Human Resources Dept. v. Java, 402 U.S. 121 (1971) 9

Felder v. Casey, 487 U.S. 131 (1988) 7

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). 11

Hagans v. Lavine, 415 U.S. 528 (1974) 8, 9

Maine v. Thiboutout, 448 U.S. 1 (1980) 6

Martinez v. California, 444 U.S. 277 (1980). 10

Mine Workers v. Gibbs, 383 U.S. 715 (1966). 8

Monroe v. Pape, 365 U.S. 167 (1961). 7

Neil v. Biggers, 409 U.S. 188 (1972) 10

Riverside v. Rivera, 477 U.S. 561 (1986). 8

Tafflin v. Levitt, ___ U.S. ___, 107 L. Ed. 2d 887 (1990) 7

Texas State Teachers Association v. Garland Independent School District, ___ U.S. ___, 103 L. Ed. 2d 866 (1989) 9

Wilson v. Garcia, 471 U.S. 261 (1985). 12

Yellow Freight System, Inc. v. Donnelly, ___ U.S. ___, 58 L.W. 4420 (1990). 6

TABLE OF AUTHORITIES – Continued

Page

Zimernon v. Burch, ___ U.S. ___, 110 S. Ct. 975 (1990) 7

OTHER CASES

Boland v. City of Rapid City, 315 N.W.2d 496 (S.D. 1982) 13

Bryan, et al. v. City of Albuquerque, et al., D.N.M. CIV 88-0107 (Order 4/19/90) 10

Chamberlain v. Brown, 223 Tenn. 25, 442 S.W.2d 248 (1969) 10

Chapman v. Luna, 102 N.M. 768, 701 P.2d 367, *cert. denied*, 474 U.S. 947 (1985) 12

Ferdinand v. City of Fairbanks, 599 P.2d 122 (Alaska 1979) 13

Intern. Soc. for Krishna v. Colo. State Far and Indus. Exposition Commn., 673 P.2d 368 (Colo. 1983) 13

Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980) 12

Jacobsen v. City of Seattle, 98 Wash. 2d 668, 658 P.2d 653 (1983) 13

Johnson v. Blum, 58 N.Y.2d 454, 448 N.E.2d 449, 461 N.Y.S.2d 782 (1983) 13

Morales v. Haines, 486 F.2d 880 (7th Cir. 1973) 8

Poling v. Goins, 713 S.W.2d 305 (Tenn. 1986) 10

Ramah Navajo School Bd. v. Bureau of Revenue, 720 P.2d 1243 (N.M. Ct. App.), *cert. denied*, 107 S. Ct. 423 (1986) 12

TABLE OF AUTHORITIES – Continued

Page

Spencer v. South Carolina Tax Com'n, 316 S.E.2d 386 (1984), *aff'd, by an equally divided court*, 471 U.S. 82 (1984) 10

Still v. Personnel Bd. of Jefferson Co., 406 So. 2d 860 (Ala. 1981), *cert. denied*, 455 U.S. 1020 (1982) 13

Thompson v. Village of Hales Corners, 115 Wis. 2d 289, 340 N.W.2d 704 (1983) 13

Verdugo v. Pima County, 135 Ariz. 401, 661 P.2d 665 (Ct. App. 1983) 13

OTHER AUTHORITIES

U.S. Const. art. I, § 10 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(3) 9

42 U.S.C. § 1983 ..... 1, 2, 7, 11, 12

42 U.S.C. § 1988 ..... *passim*

H.R. Rep. No. 94-1558, p. 4, n. 7 (1976) 8

N.M. Stat. Ann. § 22-11-1 (1978) 5

N.M. Stat. Ann. § 21-11-35 (1978) 4

New York Times, April 13, 1990, p. 11 (National Edition) 11

No. _____

In The

Supreme Court of the United States

October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD AND FRANK READY, DIRECTOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO STATE SUPREME COURT

Petitioner prays for a writ of certiorari to review the judgment of the New Mexico Supreme Court vacating and reversing the trial court's award of attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988 on the grounds that Respondents' violation of state law – which does not provide for attorney's fees – made it "unnecessary" to apply the federal remedy of 42 U.S.C. §§ 1983 and 1988 for which a fee award is an integral part of the federal remedial scheme.

OPINIONS BELOW

The New Mexico Supreme Court opinion is reported at ___ N.M. ___, 788 P.2d 348 (1990) and is attached as Appendix 1 hereto. The order denying the request for rehearing is attached as Appendix 2. The trial court judgment is attached as Appendix 3.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on February 23, 1990. Rehearing was denied on March 29, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

1. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2. 42 U.S.C. § 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1985, and 1986 of this title, title IX of public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in

its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

3. New Mexico Educational Retirement Board Rule No. VI, § A provides in relevant part:

"Eligibility"

1. The member is eligible when he has met the statutory requirements for service and extent of disability.

. . .

2. A school bus owner-driver shall not be eligible for disability benefits unless he terminates all school bus operation contracts with the public schools.

STATEMENT OF THE CASE

Petitioner maintained a contract with the Penasco Independent School District as an owner/operator of a school bus. Under provisions of the contract, regulated by the New Mexico State Department of Education, such an independent owner/operator may drive the bus herself or hire an employee, and merely manage the contract.

Petitioner became totally disabled in August of 1983 as the result of a head on collision while driving the school bus. She continued to maintain the contract, which she had held for 25 years. Petitioner was found totally and permanently disabled by the Social Security Administration and the state district court in a workers' compensation proceeding, both of which holding the non-labor retention of the contract to be irrelevant for disability purposes.

In March of 1985, Petitioner applied for Educational Retirement Disability benefits, seeking total disability under N.M. Stat. Ann. § 21-11-35 (1978), which defines total disability as "unable to obtain and retain [her] employment and other gainful employment commensurate with her background, education, and experience."

Respondents refused to process her application, quoting Regulation VI(A) which required that "a school bus driver shall not be eligible for disability benefits unless [s]he terminates all school bus operation contracts with the public schools." After a year, Petitioner divested herself of the contract and was found to be disabled as of July, 1986. Petitioner then filed an action in Santa Fe County District Court alleging that the Regulation violated Article I, § 10, of the United States Constitution as impairing the obligation of contract; and violated the Equal Protection Clause because it required divestiture by school bus driver contracts without requiring similar divestiture of other beneficiaries of Respondent New Mexico Educational Retirement Board (ERB) who might have other income producing contracts. Petitioner also claimed that Regulation VI(A) violated the Due Process Clause as being arbitrary and capricious by containing the conclusive presumption that maintenance of a school bus contract equated with lack of disability. As a separate state ground, Petitioner also claimed that the Regulation was unauthorized by the enabling statute.

The trial court, after a hearing on the merits, found for Petitioner that Regulation VI(A) violated Article I, § 10 of the United States Constitution, as impairing the obligation of contracts; and violated the due process and equal protection rights as noted above. The trial court

also found that the Regulation was unauthorized by the Educational Retirement Act, N.M. Stat. Ann. §§ 22-11-1, *et seq.* (1978). The trial court awarded attorney's fees pursuant to 42 U.S.C. § 1988, finding that the number of hours spent and the hourly rate were reasonable and awarded $5,850.00 attorney's fees. The recovery for Petitioner is now fixed at $3,150.75.

The State took appeal to the New Mexico Court of Appeals which remanded to the District Court for reentry of the form of the judgment. Petitioner then appealed to the New Mexico Supreme Court with the State cross-appealing in that forum.

The New Mexico Supreme Court affirmed the judgment that the Regulation was inconsistent with the New Mexico Educational Retirement Act, but reversed and vacated the § 1988 attorney's fee award holding as follows:

> It is unnecessary to reach the constitutional questions when there is a showing of abuse of discretion and overstepping of statutory authority.
>
> . . .
>
> Although Mrs. Gonzales claimed that ERB's rules violated various federal constitutional requirements, her suit at bottom was one to interpret and apply those rules and to determine their validity in light of governing *state* statutes. Section 1988 is accordingly not applicable. (Emphasis in original.)

(Opin. at p.3.) The court then vacated the attorney's fee award, specifically finding that there was no fee-shifting mechanism under state law. It is from this judgment that the Petition for Writ of Certiorari is taken.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 17.1 of the Rules of this Court, the following are reasons for granting the writ:

1. The State Court Has Decided An Important Question of Federal Law in Conflict with Applicable Decisions of This Court.

The decision below that "[I]t is unnecessary to reach the constitutional questions when there is a showing of abuse of discretion and overstepping of statutory authority," (Slip. Op. at 2) misapprehends the scope of the Civil Rights Act and the role of state courts in enforcing its provisions on an equal basis with federal courts, recently described in *Yellow Freight System, Inc. v. Donnelly*, ___ U.S. ___, 58 L.W. 4420 (1990).

The decision runs counter to the congressional intent that § 1988 be an integral part of the remedies necessary to obtain compliance with the Civil Rights Acts. As this Court noted in *Maine v. Thiboutout*, 448 U.S. 1, 11 (1980), citing the legislative history and the Supremacy Clause, "the fee provision is part of the § 1983 remedy whether the action is brought in federal *or state* court." The court specifically noted that "if fees were not available in state court, federalism concerns would be raised because Plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts." *Id.*, at n.12 (emphasis added). This is precisely the anticipated result of the decision. Few, if any, civil rights cases will be filed in New Mexico state courts if the award of attorney's fees to a prevailing plaintiff can be stricken on the appellate

finding that the case "at bottom" seeks construction of state law.

State courts have concurrent jurisdiction over federal claims, *Tafflin v. Levitt*, ___ U.S. ___, 107 L. Ed. 2d 887 (1990), including § 1983 actions, *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 2307 (1988). "A state may not condition the federal right to recovery or bar that right altogether." *Id., supra*, 108 S. Ct. 2302, at 2309. The federal remedy is supplementary, not alternative, to the state remedy, *Zimernon v. Burch*, ___ U.S. ___, 110 S. Ct. 975, 982 (1990); *Monroe v. Pape*, 365 U.S. 167 (1961). The availability of a state remedy is irrelevant to the existence of a cause of action under § 1983, and is independent of any other relief as may be available under state or federal law. *Felder, supra*, at 2312; *Burnett v. Grattan*, 468 U.S. 42, 50 (1984) ("The right is judicially enforceable in the *first instance*,") (emphasis in the original). New Mexico is not free, then, to restrict the scope of § 1983 and defeat its purpose by sole reliance upon state law.

Despite the ruling that the operation of Regulation VI was in excess of authorization, it also was – as the District Court found – a violation of three specific constitutional rights, and would have been so regardless of the ruling on state law. The constitutional holdings were separate and independent from the state law ground and could have been filed without a state law claim without impeding the force of the constitutional claims.

Congress enacted § 1988 specifically because it found that civil rights violations frequently involve people who cannot pay an attorney and involve claims which, as here, seek small monetary recoveries, and which are vigorously

defended by agencies with substantially greater resources than the Petitioner. *Riverside v. Rivera*, 477 U.S. 561, 577 (1986).

The legislative history of § 1988 specifically addressed this situation. The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460 states:

> To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, *is entitled to a determination on the other claim for the purpose of awarding counsel fees. Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans v. Lavine, supra; Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *Mine Workers v. Gibbs, supra*, at 725, 86 S.Ct. at 1138. (Emphasis added.)

H.R. Rep. No. 94-1558, p. 4, n.7 (1976). In this case, the substantiality of the constitutional claims is confirmed by the trial court findings of violations of the Contract Clause, the Equal Protection Clause, and Due Process Clause.

For purposes of federal jurisdiction under 28 U.S.C. § 1343(3) the court in *Hagans v. Lavine*, 415 U.S. 528 (1974) has adopted the "substantiality" doctrine, which justifies federal jurisdiction upon the pleading of a "non-frivolous" or "substantial" federal claim, allowing the statutory claims to be reached first. *California Human Resources Dept. v. Java*, 402 U.S. 121 (1971). New Mexico should therefore decide the nonconstitutional issue first to avoid unnecessary application of constitutional claims. Indeed, a state supreme court is the most appropriate forum for interpretation of state legislative and regulatory matters. As the legislative history explicitly states, however, the proper avoidance of unnecessary constitutional decisions should not result in the improper avoidance of the fee shifting remedial scheme of § 1988.

The ruling below that the case was "at bottom" one to interpret state law is contrary of the ruling of *Texas State Teachers Association v. Garland Independent School District*, ___ U.S. ___, 103 L. Ed. 2d 866 (1989), holding that fees are awardable under § 1988 once a "material alteration" of a legal relationship has been effected, regardless of whether the party prevailed on a "central issue." Likewise, the test is not whether the plaintiff prevailed on a "central issue," or "at bottom," but rather whether the federal claims asserted were "substantial" or "non-frivolous." *Hagans, supra.*

2. The State Court Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This Court has previously affirmed by an equally divided court a tax appeal, in which the same issue was

raised. *Spencer v. South Carolina Tax Comm'n*, 316 S.E.2d 386 (1984), *aff'd., by an equally divided court*, 471 U.S. 82 (1984). Such affirmance by an equally divided court is not entitled to precedential weight. *Neil v. Biggers*, 409 U.S. 188 (1972). In *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 1730 (1987), this court after reversing on the merits, remanded to the Supreme Court of Arkansas to determine the applicability of § 1988. The Supreme Court of Arkansas found § 1988 applicable, thereby obviating the issue. 293 Ark. 395, 738 S.W.2d 402 (1987).

While the question of whether a state *must* entertain a civil rights action has never been expressly decided, this Court has noted that where similar types of claims arising under state law would be enforced in state courts, the court is generally not free to refuse enforcement of the federal claim. *Martinez v. California*, 444 U.S. 277, 283, n. 7 (1980).[1] Congress' intent is that federal civil rights laws be given a uniform application within each state. There is no question but that the federal court in the District of New Mexico provides for award of attorney's fees under § 1988, where a state claim is appended.[2] Where state courts do open their courts to federal causes

---

[1] *See also Poling v. Goins*, 713 S.W.2d 305 (Tenn. 1986), *overruling, Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969) which had held § 1983 actions not cognizable in Tennessee state courts.

[2] *See e.g., Bryan et al. v. City of Albuquerque, et al.*, No. CIV 88-0107 (Order 4/19/90), Plaintiffs filed civil rights action contesting zoning decision; stayed the action, obtained relief by way of zoning variation and settlement; and were awarded fees.

of action, they must give the Plaintiffs the benefit of the full scope of these federally created rights. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942).

The practical aspect of this ruling will be to mandate the filing of all Civil Rights cases in federal courts in New Mexico. This result is particularly true because, as here, a litigant may prevail on both federal and state claims in state district court only to have the federal claims vacated on appeal, with the New Mexico appellate courts determining that the matter rested "at bottom" upon construction of state law. There would seem to be few cases in which filing in state court would be a viable or reasonable tactic. The disincentive to commence state court litigation would also make a repetition of this issue unlikely, thereby evading review.[3]

This Court has thus come close to addressing the issue, but has not specifically ruled that the Supremacy Clause and Congressional intent require that state courts apply § 1983 and § 1988 – at least where the trial court findings support such application, the state appellate courts have not otherwise disturbed the lower judgment, and there is otherwise no fee-shifting mechanism. The public importance of encouraging full state court

---

[3] The *New York Times* reported in hearings in Dallas convened by the House Banking Committee on April 12, 1990, that "the federal court system, already overloaded with drug related cases, will be burdened further in the years ahead with hundreds of criminal cases now being prepared against former executives of failed savings institutions, government officials said today." *New York Times*, April 13, 1990, p. 11 (National Edition).

participation in the vindication of small federal constitutional claims is evident.[4]

The Court's holding that "this case is not one to enforce 42 U.S.C. 1983 (or any other civil rights statute) and therefore no attorney's fees are awarded under 42 U.S.C. 1988" misapprehends the nature of the Civil Rights Act and amendments. The Act, by itself, provides only a remedy and does not create substantive rights. *Wilson v. Garcia*, 471 U.S. 261 (1985). It is this remedy which Petitioner seeks to have enforced and which the New Mexico Supreme Court did not appreciate. The flawed perception of the role of §§ 1983 and 1988 will have serious consequences on litigation in the State of New Mexico should this petition not be granted.

The equities of this case tilt strongly in favor of Petitioner. Firmly convinced of the illegality of the ERB regulation, she prevailed at trial and on appeal on the merits – only to be faced with an attorney's fee larger than her recovery. It is beyond peradventure that she would not have pursued the claim had she been aware of the State Supreme Court's construction of state and federal law, to foreclose the application of §§ 1983 and 1988.[5]

---

[4] In *Chapman v. Luna*, 102 N.M. 768, 701 P.2d 367, *cert. denied*, 474 U.S. 947 (1985), the New Mexico Supreme Court affirmed a denial of fees under § 1988 on the grounds that the Equal Protection violation was one of state constitutional law rather than federal law. The only other considerations of § 1988 in New Mexico appellate courts appear to be *Jacobs v. Stratton*, 94 N.M. 665, 615 P.2d 982 (1980) (remanding for consideration of fees), and *Ramah Navajo School Bd. v. Bureau of Revenue*, 720 P.2d 1243 (N.M. Ct. App.), *cert. denied*, 107 S. Ct. 423 (1986), awarding fees for federal claim.

[5] As noted in the Statement, it was the Respondent who initiated the appellate proceedings in this matter, increasing Mrs. Gonzales' attorney's fee expense, despite being affirmed.

3. The State Court Has Decided An Important Federal Question in Conflict With Other State Courts Of Last Resort.

State supreme court cases which have ruled in favor of consistency with federal law include *Ferdinand v. City of Fairbanks*, 599 P.2d 122, 125 (Alaska 1979) (federal, rather than state guidelines apply); *Johnson v. Blum*, 58 N.Y.2d 454, 448 N.E.2d 449, 461 N.Y.S.2d 782 (1983) (applying the substantiality test); *Intern. Soc. for Krishna v. Colo. State Far and Indus. Exposition Comm'n*, 673 P.2d 368 (Colo. 1983); *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983); *Jacobsen v. City of Seattle*, 98 Wash. 2d 668, 658 P.2d 653 (1983).

State courts, like New Mexico, which have declined to award attorney's fees under § 1988 include *Verdugo v. Pima County*, 135 Ariz. 401, 661 P.2d 665 (Ct. App. 1983); *Boland v. City of Rapid City*, 315 N.W.2d 496 (S.D. 1982); *Still v. Personnel Bd. of Jefferson County*, 406 So. 2d 860 (Ala. 1981), *cert. denied*, 455 U.S. 1020 (1982) (upholding trial courts refusal to award 1988 fees).

The better reasoned cases follow the legislative history of § 1988, applying the substantiality test when the merits are decided by application of state law.

CONCLUSION

New Mexico has the obligation to apply §§ 1983 and 1988 in state courts as intended by Congress in the House Report and to consider the "substantiality test" when a case is decided on alternative state grounds. The record in this case of the trial court's consideration and application of § 1988 gives this Court an appropriate record to decide the duty of New Mexico state courts, in particular, and of state courts in general, and presents an issue of public importance to the litigants, citizens of New Mexico and to all concerned with alternatives to litigation in the increasingly crowded federal court system. Petitioner prays that the Writ be granted.

Dated: May 30, 1990

JAMES A. BURKE
Post Office Box 9332
Santa Fe, New Mexico 87504-9332
(505) 988-4657

Counsel for Petitioner

APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

DOROTHY GONZALES,

Petitioner-Appellant
and Cross-Appellee,

No. 18,114

vs.

NEW MEXICO EDUCATIONAL
RETIREMENT BOARD and
FRANK READY, Director,

Respondent-Appellees
and Cross-Appellants.

APPEAL FROM THE DISTRICT
COURT OF SANTA FE COUNTY

Roger L. Copple, District Judge

(Filed Feb 23, 1990)

James A. Burke
Santa Fe, New Mexico — for Appellant

Hal Stratton, Attorney General
Andrea R. Buzzard, Assistant
Attorney General
Santa Fe, New Mexico — for Appellees

OPINION

BACA, Justice.

Petitioner Dorothy Gonzales appeals from an order of mandamus which denied retroactive disability benefits to the date of the accident, August 16, 1983. The New Mexico Educational Retirement Board (ERB or the Board) and Frank Ready cross-appeal the declaration that ERB Regulation VI is unconstitutional, the award of disability

benefits from January 1985, and the award of reasonable attorney fees pursuant to 42 U.S.C. § 1988. We reverse in part and affirm in part.

This case does not rise to the level of a constitutional question. It is rather a question of the ERB exceeding its statutory authority and abusing its discretion in denying Ms. Gonzales benefits and in creating regulations outside its stated authority. Ms. Gonzales was apparently totally disabled in an accident, yet was not awarded disability benefits until nearly three years after the accident. Ms. Gonzales must bear some of the responsibility for such a late award as she did not apply until eighteen months after the accident. A constitutional resolution of this problem is unnecessary.

FACTS.

Ms. Gonzales, a school bus owner/driver was involved in an accident in August 1983, while driving a school bus for Penasco schools. She was found to be totally disabled by both the Worker's Compensation Board and the Social Security Administration. Although Ms. Gonzales no longer drove the bus after the accident, she continued to maintain her rights in the bus contract along with her husband, and hired an employee to drive the bus.

The nature of the Board of Education school bus contract differs from an employment contract. The contractor is paid a lump sum for such anticipated costs as maintenance, oil, gas, drivers' salary, etc. The driver may either drive the bus himself/herself and keep all net profits, or hire a driver and keep profits remaining after

the driver's salary and expenses are paid. It is uncontroverted that the terms of the contract provide that a contractor may hire another person to drive the bus.

Ms. Gonzales applied for disability benefits from the ERB in March of 1985, eighteen months after the accident. ERB advised Ms. Gonzales that under its Regulation VI(A) "[a] school bus owner/driver shall not be eligible for disability benefits unless (s)he terminates all school bus operation contracts with the public schools." It therefore refused to process her application until she divested herself of any interest in the contract. Although she claimed disability and did not drive the bus herself, Ms. Gonzales finally resigned her contract in February 1986, and reapplied. Her application was again denied because if was found to be stale. As of July 1986, the ERB found petitioner eligible for benefits. This was one month shy of three years from the time of the accident.

Petitioner then sued ERB alleging that Regulation VI was unconstitutional in that it violated the equal protection, due process, and contract clauses by forcing Ms. Gonzales to divest herself of the contract before receiving benefits, or in the alternative, exceeded the authority granted ERB by statute. Ms. Gonzales also sued under 42 U.S.C. § 1983 and § 1988, claiming that her civil rights had been violated by the ERB and that she was therefore entitled to attorney's fees. The district court awarded $4,500 in attorney's fees under 42 U.S.C. § 1988, and found Regulation VI to be unconstitutional as applied, granting Ms. Gonzales disability benefits from January 1985, when the Board first had constructive notice of the disability.

The state claims that because the petitioner failed to exhaust her administrative remedies by appealing the Board's decision to the board under ERB Rule I, § C(2), mandamus does not lie. Although this is generally true, when a board has acted outside its jurisdiction, as in this case, mandamus is properly granted. *Sanderson v. New Mexico State Racing Comm'n*, 80 N.M 200, 453 P.2d 370 (1969).

CONSTITUTIONAL QUESTION NOT REACHED.

It is unnecessary to reach the constitutional questions when there is a showing of abuse of discretion and overstepping of the statutory authority. The Educational Retirement Act, NMSA 1978, §§ 22-11-1 to -45 (Repl. Pamp. 1989) (the Act) is the legislative grant of authority for the ERB. § 22-11-35 deals with actions of the Board in relation to disability benefits. It provides:

> A. A member *shall* be eligible for disability benefits if [s]he has acquired ten years or more of earned service-credit and the *board certifies the member to be totally disabled* to continue [her] employment and unable to obtain and retain other gainful employment commensurate with [her] background, education and experience.
>
> B. Prior to any certification of disability by the board, the board shall require each applicant for disability benefits to submit [herself] to a medical examination by the medical authority.

NMSA 1978, § 22-11-35 (emphasis added).

The legislature, through this statute, has granted the ERB the authority to award disability benefits if certain requirements are met. If the Board certifies the eligible

member to be totally disabled, the Board must award benefits. Once the determination of total disability is made, it is the duty of the Board to certify the member as disabled. There is nothing in this grant of authority which authorizes the Board to refuse to accept an application for disability if the applicant continues to hold a property interest in a bus contract.

The Board has the authority by regulation to set out an application process in order to determine disability. It does not, however, have the statutory power to create unreasonable or irrelevant requirements within the application process, before it considers the application. ERB does not even consider an application if the application maintains an interest in a bus contract. This goes beyond the power vested in the ERB to certify an applicant as totally disabled. ERB did not act reasonably in determining when Ms. Gonzales' application was complete so that review of her disability would commence. Compliance with Regulation VI(A) as a condition precedent to even considering the application goes beyond ERB's statutory authority. The applicant's work activities in administering a bus contract may be relevant to a consideration of total disability but should not be a bar to initial evaluation.

An agency may not create a regulation that exceeds its statutory authority. *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 686 P.2d 934 (1984); *see Family Dental Center of New Mexico v. New Mexico Board of Dentistry*, 97 N.M. 464, 641 P.2d 495 (1982). To claim that an application for disability will not be considered so long as an applicant maintains an interest in a bus contract goes beyond the

legislative intent in allowing the ERB the power to determine disability. It would more likely be within the legislative intent to consider the contract and activities required by it as factors measured against the definition of total disability. It may be possible, however, to maintain a property interest and be disabled at the same time. If a party is disabled under the statute, then that party should receive disability benefits and the Board exceeds its authority by not considering the application.

WHEN SHOULD BENEFITS BEGIN?

Petitioner Gonzales also argues that Regulation VI(C) is an unconstitutional "Statute of limitations." Regulation VI(C) provides:

> *Effective Date of Benefits*
>
> (1) The effective date of disability benefits *shall* be the first day of the month following the member's termination of employment, or the first day of the month following *receipt of the member's application*, whichever is later. (Emphasis added.)

This regulation *is* within the scope of power vested in the Board by the Act. The legislature, through the Act, gives authority to the Board to grant disability benefits *after an applicant has been certified* disabled. Delaying benefits until the time of application falls within the statutory grant because the Board must have information upon which to base its disability decision. This logically and reasonably falls within the grant of authority vested in the ERB.

The ERB exceeded its authority and abused its discretion in creating Regulation VI(A) by requiring divestment

of the contract before the application would be considered. However, requiring an application before awarding benefits is an acceptable use of the Board's power. So the question remaining is when should benefits begin? Regulation VI(C) provides that benefits should begin either one month after termination or one month after an application is received, whichever is later. Notice of disability is what is necessary, and in this instance the ERB had notice of disability through the filing of an application March 1, 1985. Benefits for Ms. Gonzales should have begun on April 1, 1985, one month after receipt of her application. It would serve no useful purpose to go back and try to reconstruct the period when she was disabled but still maintained an interest in the bus contract.

ATTORNEY'S FEES, PREJUDGMENT INTEREST.

This case is not one to enforce 42 U.S.C. § 1983 (or any other civil rights statute), and therefore no attorney fees are awardable under 42 U.S.C. § 1988. Although Ms. Gonzales claimed that the ERB's rules violated various federal constitutional requirements, her suit at bottom was one to interpret and apply those rules and to determine their validity in light of the governing *state* statutes. § 1988 is accordingly not applicable. There is no other statute that pertains to this situation from which attorney's fees might be awarded. Without an authorizing statute, attorney's fees may not be awarded. *Martinez v. Martinez*, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984); *Norton v. Board of Education of Hobbs Municipal Schools*, 89 N.M 470, 472, 553 P.2d 1277, 1279 (1976). Prejudgment interest also is not awardable as against a state agency. NMSA 1978, § 56-8-4 (Repl. 1986); *see also Bradbury &*

Stamm Constr. Co. v Bureau of Revenue, 70 N.M. 226, 238, 372 P.2d 808, 816-17 (1962).

In conclusion, the ERB overstepped its statutory authority in denying then delaying benefits based on Regulation VI(A). It did not have the authority to deny a hearing to a claimed disabled party simply because she maintained an interest in a contract without more. Benefits should therefore be awarded in accordance with Regulation VI(C) one month after receipt of Ms. Gonzales' first application, April 1, 1985. Because appellant no longer maintains the contract, further inquiry in this regard is not necessary. Attorney's fees and prejudgment interest may not be awarded. We reverse in part and affirm in part and remand for entry of judgment in accordance with this opinion.

IT IS SO ORDERED.

/s/ Joseph F. Baca
JOSEPH F. BACA, Justice

WE CONCUR:

/s/ Seth D. Montgomery
SETH D. MONTGOMERY, Justice

/s/ Kenneth B. Wilson
KENNETH B. WILSON, Justice

APPENDIX B

IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO Thursday, March 29, 1990

DOROTHY GONZALES,

Petitioner-Appellant
and Cross-Appellee,

vs.

NEW MEXICO EDUCATIONAL RETIREMENT
BOARD and FRANK READY, Director,

Respondents-Appellees
and Cross-Appellants.

This matter coming on for consideration by the Court upon Motion of Appellant for rehearing and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion of Appellant for rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

FIRST JUDICIAL DISTRICT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

DOROTHY GONZALES,

Petitioner.

vs.

No. SF 87-2088 (C)

NEW MEXICO EDUCATIONAL RETIREMENT BOARD, and FRANK READY, Director,

(ENDORSED OCT 25, 1988)

Respondents.

FINAL JUDGMENT AND PREEMPTORY WRIT OF MANDAMUS

The Court having been fully advised in the matter by trial on October 25, 1987, and the Court having reviewed evidence, heard arguments, admissions and stipulations of counsel, the Court makes the following findings of fact:

1. Petitioner is a resident of Penasco, Taos County.

2. Respondent Ready is Director of the New Mexico Educational Retirement Board. Among other functions, Respondents administer the disability provisions for the Educational Retirement Act, 22-11-35 NMSA *et seq.*

3. At all relevant times. Petitioner and her husband, for approximately 25 years, held a single school bus owner/operator contract with the Penasco Independent School District. Petitioner was the primary operator and administrator of the contract. On August 16, 1983, Petitioner became totally and permanently disabled as result

of a school bus accident when another vehicle crossed the center line and collided with her bus head-on.

4. As is provided by the Department of Education regulations and the school bus contract, Petitioner hired an employee to drive the bus after becoming disabled.

5. Petitioner was found permanently and totally disabled by the District Court of the 8th Judicial District, Cause No. 83-371 (CV), *Gonzales v. Mountain States* in which the Court found that Petitioner met the disability requirement of 52-1-25 NMSA, that she was "wholly unable to engage in her past occupation and any other occupation considering her age, education, experience, and educational background."

6. Petitioner was also found totally disabled by the United States Social Security Administration, pursuant to 42 U.S.C. 405, which provides for disability if one is "wholly unable to engage in any substantial gainful activity that exists in a significant numbers in the national economy."

7. Petitioners began the application process for disability benefits in January, 1985.

8. Respondents declined to process her disability application until she removed her name from the school bus contract, holding that the application was not "valid" unless she removed her name from the school bus contract.

9. This action was based upon Educational Retirement Board Rule No. VI., § A, which states:

"Eligibility"

> 1. The member is eligible when he has met the statutory requirements for service and extent of disability . . . .
>
> 2. A school bus owner-driver shall not be eligible for disability benefits unless he terminates all school bus operation contracts with the public schools.

10. Petitioner reluctantly removed her name from her contract, in February, 1986. Petitioner has been found disabled by the Educational Retirement Board, as of July 1986, pursuant to her application of June 1986. Respondents have declined Petitioner's request to extend the disability to either the date of her application or the date of her accident.

The Petitioner claims that:

11. Respondent's actions and its application of Rule VI.(A)(2) restricting disability benefits to school bus owner/operators who terminate school bus contracts is unauthorized by the Educational Retirement Act and 22-11-1 *et seq*, and specifically 22-11-35(A) which states:

> "A member shall be eligible for disability benefits if he has acquired 10 years or more of earned service credit and the Board certifies the member to be totally disabled to continue his employment and unable to obtain and retain other gainful employment commensurate with his background, education and experience."

12. There is no legislative direction to require school contractors to terminate contracts if they are otherwise disabled.

Petitioner also claims that;

13. the operation of Rule VI, § A(2) violates the Civil Rights Petitioner as protected by the 14th Amendment to the U.S. Constitution and 42 U.S.C. 1983 because it violates the Equal Protection Clause.

4. Specifically, it requires Petitioner and similar situated disabled school bus contractors to divest themselves of a valuable property right while not making similar demands upon other applicants. Conversely, while requiring divestiture of school bus contracts, the rule does not require divestiture by any applicant of any other contractual or business property right. Said underinclusiveness and overinclusiveness is unrelated to a rational governmental interest and is not tailored sufficiently narrowly to withstand Constitutional scrutiny.

Petitioner further claims that;

15. Rule VI, § A(2), and the Board's application thereof, violates Plaintiff and similar situated persons constitutional rights to substantive due process of law because is constitutes a conclusive presumption that a person cannot be disabled pursuant to 22-11-35 if they retain a school bus contract when in fact, Petitioner's medical condition, and the District Court and Social Security Administration judgment show this presumption to be untrue.

Petitioner claims that;

16. Rule VI A(2) is violative of Article 1, § 10 U.S. Constitution and 42 U.S.C. 1983. Article 1, § 10 states:

> "No state shall . . . pass any . . . Law impairing and Obligations of Contracts . . . "

17. The operation and administration of Rule VI, A(2) impairs the obligation of contracts of requiring applicants for disability who have school bus contracts to terminate them.

Based upon the foregoing findings of fact, this Court concludes the following:

1. Regulation VI(A)(2) is violative of Article 1, § 10 of the United States Constitution of 42 U.S.C. 1983 by impairing the obligations of contracts; and is violative of Plaintiffs right to due process and equal protection of the law and is unauthorized by the Education Retirement Act, 22-11-1 *et seq.* N.M.S.A.

2. The Court finds that Plaintiffs counsel has expended 50 hours on the preliminary trial on the matter, and another 15 hours on research and appearance before the Court on remand of the matter. Counsel is an experienced attorney with 15 years experience; including substantial civil rights and public benefit litigation and that the public interest is served by a representation of Mrs. Gonzales.

3. The Court further finds that the expenditure of time is reasonable time, and all of the time was necessary in the prosecution and vindication of the eventual attack on the aforesaid regulation and was not a mere preliminary as in the case decided by defendant. The Court is aware that hourly rates in the Santa Fe area vary from $80-$150 per hour, that $90 per hour requested by the Plaintiff is reasonable; and given the attempt by the Defendant to relitigate the issues previously adjudged the counsel has been unnecesarily required to expend time.

IT IS THEREFORE ORDERED adjudged and decreed that Defendants be and hereby are prohibited and restrained from applying said regulation;

IT IS FURTHER ORDERED adjudged and decreed that Plaintiffs counsel be and hereby is awarded and amount of $5850.00 plus applicable gross receipt tax pursuant to 42 U.S.C. 1988. Plaintiff also should be awarded pre-judgment interest as well.

IT IS FINALLY ORDERED and adjudged and decreed pursuant 44-2-12 N.M.S.A. that a Preemptory Writ of Mandamus be and hereby is issued directing Defendants to comply with their mandatory non-discretionary duty of complying with the United States Constitution and New Mexico Statutes as noted above, and are directed to comply with their mandatory and non-discretionary duty of paying Ms. Gonzales disability benefits from January 1985 to the present, with a credit provided for such monies previously paid, and to pay Petitioner's counsel, the attorney's fees enumerated in this Order.

Signed by:

/s/ Roger L. Copple
District Judge

Submitted by:

/s/ James A. Burke
James A. Burke
Attorney for Petitioner
P.O. Box 9332
Santa Fe, NM 87504-9332
(505) 988-4657

No. 89-1892

In The

Supreme Court of the United States

October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD AND FRANK READY, DIRECTOR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAL STRATTON
Attorney General
Counsel of Record

ANDREA R. BUZZARD
Assistant Attorney General

Attorneys for Respondents
Post Office Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner may recover attorney's fees under 42 U.S.C. §1988 in this state mandamus action where she alleged invalidity of a state regulation under state law and under the United States Constitution and prevailed on her state claim but did not prevail on her alleged federal claim under 42 U.S.C. §1983?

2. Whether the question Petitioner raises in this Court is moot, because Respondents are not "persons" under 42 U.S.C. §1983 and thus are not amenable to an award of attorney's fees under 42 U.S.C. §1988?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

1. This Case Presents No Substantial Federal Question 2

2. Respondents Are Not "Persons" Under 42 U.S.C. §1983 In This Action, And, Therefore, The Question Petitioner Raises is Moot 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

U.S. CASES CITED:

Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935) 5

Griswold v. Connecticut, 381 U.S. 479 (1965) 5

Harris v. Reed, 109 S.Ct. 1038, 1042 (1989) 5

Meyer v. Nebraska, 262 U.S. 390 (1923) 5

Michigan v. Long, 463 U.S. 1032, 1042 (1983) 5

Ngiraingas v. Sanchez, 110 S. Ct. 1737 (1990) 4

Roe v. Wade, 410 U.S. 113 (1973) 5

Texas State Teachers Ass'n v. Garland Independent School Dist., 109 S.Ct. 1486 (1989) 5, 6

Will v. Michigan Dept. of State Police, 109 S.Ct. 2304 (1989) 7

CASES FROM OTHER JURISDICTIONS:

Chapman v. Luna, 102 N.M. 768, 701 P.2d 367, *cert. denied*, 474 U.S. 947 (1985) 3

Gomez v. Board of Educ., 85 N.M. 708, 516 P.2d 679 (1973) 3

Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980) 3

Poirier v. Hodges, 445 F.Supp. 838, 842 (M.D. Fla. 1978) 4

OTHER AUTHORITIES CITED:

U.S. Const. art 1, §10 3

28 U.S.C. §1257 1

42 U.S.C. §1983 .....2, 3, 4, 5, 6, 7

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §1988 ..... 2, 3, 7

NMSA 1978, §§22-11-1 to -45 (Repl. Pamp. 1989) 1

NMSA 1978, §§44-2-1 to -14 (Orig. Pamp.) 1

ERB Rule VI(A)(2) 1, 2, 3, 4, 5

JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257, not under §1254 (1) as recited in her petition.

STATEMENT OF THE CASE

Petitioner is a disability retiree under the Educational Retirement Act ("ERA"), NMSA 1978, §§22-11-1 to -45 (Repl. Pamp. 1989). Before her retirement on disability, Petitioner had been a member of the educational retirement system as a school bus "owner/driver". School bus "owner/drivers" are eligible for ERA membership under regulations of the educational retirement board, although independent contractors generally are excluded from membership. Before her retirement on disability, Petitioner and her husband had maintained, jointly, school bus operation contracts with the Penasco school district.

Petitioner alleged that she became disabled in August of 1983 but did not file with Respondents an application for disability benefits under ERA until March of 1985. Respondents immediately commenced processing her application, but Petitioner refused to comply with ERB Rule VI(A)(2) until February of 1986, when she removed her name from the bus contracts she and her husband held with Penasco. Thereafter, and upon her reapplication for benefits, ERB awarded disability benefits effective July 1, 1986.

On October 9, 1987, Petitioner filed a mandamus action in state court under NMSA 1978, §§44-2-1 to -14

(Orig. Pamp.) against Respondents. Respondent educational retirement board is a state agency. Respondent Ready is its director. Petitioner sued Mr. Ready only in his official capacity as director. She made no allegations of personal liability against Mr. Ready.

Petitioner sued for retroactive disability benefits for the period from August 16, 1983 to July 1, 1986. Material to part of her claim for retroactive benefits, Petitioner alleged that ERB rule VI(A)(2) was unconstitutional as a denial of equal protection and due process and an impairment of contract and was invalid under state law. Petitioner sought attorney's fees under 42 U.S.C. §1988. The relief Petitioner sought was purely retrospective.

On October 29, 1987, a hearing was had resulting in an order that both parties appealed and in a remand for entry of a final judgment and peremptory writ of mandamus. Upon appeal from that judgment by both parties, the New Mexico Supreme court reversed the district court's award of attorney's fees, reversed the award of prejudgment interest and reversed, in part, the retroactive benefit award. The New Mexico Supreme Court held that ERB Rule VI(A)(2) violated state law; that Petitioner's case was not one to enforce 42 U.S.C. §1983; that her case did not rise to the level of a constitutional question; and that a constitutional resolution of the case was not necessary.

REASONS FOR DENYING THE WRIT

1. This Case Presents No Substantial Federal Question.

Petitioner did not prevail on her asserted 42 U.S.C. §1983 claims. Therefore, even if Respondents were

amenable to an attorney's fee award, Petitioner could not receive a fee award under 42 U.S.C. §1988. Petitioner cites no case holding that where a party asserts both a federal and a state cause of action and does not prevail on the federal cause but does on the state cause, he is entitled to attorney's fees under the federal statute. By its plain language, §1988 limits fee awards to a party who prevails in an action to enforce one of the federal civil rights laws. It does not provide for an award of fees in any other action. The district court's conclusions that Respondents had violated federal law were not upheld by the New Mexico Supreme Court. Because Petitioner did not prevail in proving a deprivation of federal constitutional rights, privileges or immunities in a §1983 action, Petitioner is not entitled to attorney's fees under §1988. *Chapman v. Luna*, 102 N.M. 768, 701 P.2d 367, *cert. denied*, 474 U.S. 947 (1985).

New Mexico courts do entertain 42 U.S.C. §1983 causes of action,[1] and, in such cases, permit the award of attorney's fees to a plaintiff who prevails.[2] But this case is not such a case. To claim a §1983 violation, Petitioner relies on Article 1, Section 10 of the United States Constitution (prohibiting laws that impair contracts) in arguing the unconstitutionality of ERB Rule VI(A)(2). However, §1983 was enacted to enforce the provisions of the Fourteenth Amendment. "Article 1, Section 10 of the Constitution is an independent obligation upon the states. . . . It is

---

[1] *See, e.g., Gomez v. Board of Educ.*, 85 N.M. 708, 516 P.2d 679 (1973).

[2] *See, e.g., Jacobs v. Stratton*, 94 N.M. 665, 615 P.2d 982 (1980).

not . . . part of the . . . constitutional rights guaranteed and protected by the Fourteenth Amendment." *Poirier v. Hodges*, 445 F.Supp. 838, 842 (M.D. Fla. 1978) (holding that the plaintiff failed to state a claim under §1983 for alleged violation of the contract clause of the constitution). Recently, this Court re-affirmed that "Section 1983 . . . was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment." *Ngiraningas v. Sanchez*, 110 S. Ct. 1737 (1990) (quoting *Quern v. Jordan*, 440 U.S. 332, 354 (1979)). Petitioner, therefore, did not state a §1983 claim with respect to her claim that ERB Rule VI(A)(2) impaired her contract rights.

Petitioner also urged, without evidentiary support, that ERB Rule VI(A)(2) denies equal protection, because it allegedly treats bus drivers differently from other members in requiring that they terminate their bus contracts to receive disability benefits. That assertion is not correct. Other ERA members such as teachers, who are on contract with the school districts, could not receive disability benefits under ERA unless they terminated their employment contracts. ERB Rule VI(A)(2) merely sought to treat all members the same. Petitioner wanted favored treatment. For example, teachers who become disabled could not cease rendering services; hire a family member or other person to substitute for them; and continue to receive income under the certified school instructor contract. Petitioner did not prove a §1983 equal protection violation.[3]

---

[3] Nor did Petitioner prove a substantive due process claim. Generally, substantive due process limits the ability of a

(Continued on following page)

Petitioner's complaint that the New Mexico Supreme Court decided the validity of ERB's rule based on state law does not provide a jurisdictional basis in this Court to review that decision. This Court has long held that it will not consider a federal law question on review of a state court judgment if that judgment rests on an "independent" and "adequate" state law ground. *Harris v. Reed*, 109 S.Ct. 1038, 1042 (1989); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). A state court's "plain statement" that its decision rests on state law grounds forecloses review by this Court. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Since *Long*, this Court has repeatedly followed the "plain statement" rule. *Harris* at 1042, n. 7. In Petitioner's case, the New Mexico Supreme Court "plainly stated" that its decision about the validity of ERB Rule VI(A)(2) was based solely on state law. Petitioner may not seek review in this Court of the New Mexico Supreme Court's decision in that regard.

The cases Petitioner cites do not support her claim for attorney's fees even though she did not prevail before the state's highest court upon her asserted federal claims. Petitioner states that the decision in her case is contrary to *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 109 S.Ct. 1486 (1989) (petition at 9). But *Garland* is not pertinent to this case. In *Garland*, a federal §1983 suit, the plaintiff had prevailed, in part, on her §1983 claims.

(Continued from previous page)

legislature or congress to enact legislation in areas involving certain fundamental rights. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The issue this Court decided in *Garland* was the proper test to apply in determining attorney's fees entitlement to a plaintiff who partially prevails in a §1983 suit.

This case does not present the issue whether New Mexico courts *must* entertain §1983 claims (petition at 9-12). Petitioner's contract claim is not a §1983 claim; her equal protection claim is without evidentiary support and is refuted by a comparison to other contract employees, such as teachers; and her substantive due process claim lacks evidentiary and authoritative support. The state cases Petitioner cites as reflecting conflict (petition at 13) do not evidence conflict on the issue whether attorney's fees can be awarded under §1988 to a plaintiff who does not prevail on §1983 claims.

The New Mexico Supreme Court correctly ruled that Petitioner's action was not one to enforce §1983; that her case did not rise to the level of a constitutional question; and that a constitutional resolution of her case was not necessary. This Court should decline review, because this case presents no substantial federal question.

2. Respondents Are Not "Persons" Under 42 U.S.C. §1983 In This Action, And, Therefore, The Question Petitioner Raises is Moot.

In her mandamus action, Petitioner sued a state agency and its director in his official capacity only as director. Petitioner sought purely retrospective relief, specifically, a sum of money from the retirement fund,[4]

---

[4] The educational retirement fund is in the custody of the state treasurer. §22-11-11.

representing a retroactive benefit award. Her desired recovery, therefore, was indistinguishable from an award of damages against the state.

In *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989), this court held that a state agency and a state officer sued in his official capacity in a §1983 action for damages are not "persons" under §1983. Respondents, likewise, are not "persons" under §1983, and, therefore, attorney's fees may not be awarded against them under §1988.[5] The issue Petitioner raises is moot, because even if she proved a §1983 claim, Respondents are not, in this action, amenable to §1983 liability and to §1988 attorney's fees.

CONCLUSION

Respondents respectfully pray that this Court deny Petitioner's petition for writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

HAL STRATTON
Attorney General

ANDREA R. BUZZARD
Assistant Attorney General

Attorneys for Respondents
Post Office Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

---

[5] Although not addressed by the New Mexico Supreme Court in its opinion in this case, Respondents vigorously argued, as point I to their brief-in-chief on cross-appeal, that attorney's fees could not be awarded against them, because they were not "persons" under §1983.

(3)

No. 89-1892

In The

Supreme Court of the United States

October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD and FRANK READY, Director,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

JAMES A. BURKE
Post Office Box 9332
Santa Fe, New Mexico 87504-9332
(505) 988-4657

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 89-1892

In The

Supreme Court of the United States

October Term, 1989

DOROTHY GONZALES,

Petitioner,

v.

NEW MEXICO EDUCATIONAL RETIREMENT BOARD and FRANK READY, Director,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF

INTRODUCTION

Pursuant to Rule 15.7 of the Supreme Court Rules, Petitioner respectfully files this supplemental brief. The cases discussed to which the attention of the Court is respectfully referred are: *Howlett v. Rose*, ___ U.S. ___, 110 L. Ed. 2d 332 (1990) (No. 89-5383); *Dennis v. Higgens*, 451 N.W.2d 676 (Neb. 1990), *cert. granted*, 110 S. Ct. 2559 (5/29/90) (No. 89-1555); and *Oregon State Police Officers Association v. Oregon*, 766 P.2d 408 (Or. Ct. App. 1988), *petition for cert. filed*, 58 U.S.L.W. 3727 (U.S. Apr. 11, 1990) (No. 89-1604).

I.

HOWLETT v. ROSE

On June 11, 1990, this Court ruled that the Supremacy Clause requires a state court to entertain a claim under § 1983. The Court went on to note that "[T]he Florida Court's refusal to entertain one discrete category of § 1983 claims, while the Court entertains similar state law actions against state defendants, violates the Supremacy Clause." 110 L. Ed. 2d at 353. Here, as there, the state court held that the respondent had violated mandatory, non-discretionary duties under state law, but refused to apply that judgment to Petitioner's § 1983 claim. It would appear that *Howlett, supra,* is directly in point.

II.

DENNIS v. HIGGENS

Dennis v. Higgens, supra, implies the same issue. This Court granted review on the question whether a claim arising under the Commerce Clause may be brought pursuant to 42 U.S.C. § 1983. The state did not appeal the trial court judgment that the tax was illegal. It would appear, therefore, that the only live issue is whether 42 U.S.C. §§ 1983 and 1988 may be invoked in a Commerce Clause case, where a plaintiff has already prevailed on the state law claim, but without the fee-shifting purpose of § 1988.

III.

OREGON STATE POLICE OFFICERS ASSOCIATION v. STATE OF OREGON

In *Oregon State Police Officers Association v. Oregon, supra,* the identical issue is presented to this Court. The

only difference visible to Petitioner is that the Oregon Police Officer's Association may have been able to pay plaintiff's counsel without the invocation of 42 U.S.C. § 1988, whereas in the instant case Mrs. Gonzales' vindication of her right to $3,000 of disability benefits required a liability of over $6,000 attorney's fee.

CONCLUSION

Intent to exclude reliance upon § 1983 as a remedy for a deprivation of a federally secured right is not lightly inferred and the burden is on the state to show by express provision, or other specific evidence, that Congress intended to foreclose such private enforcement. *Wilder v. Virginia Hospital Association*, 58 U.S.L.W. 4795 (June 12, 1990). The effect of 42 U.S.C. § 1988 is not impeded by the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678 (1978).

Accordingly, Petitioner respectfully refers the Court to the above-mentioned cases in support of her Petition for Certiorari to reverse the exclusion of 42 U.S.C. § 1983 and § 1988 by the New Mexico Supreme Court.

JAMES A. BURKE
Post Office Box 9332
Santa Fe, New Mexico 87504-9332
(505) 988-4657

Counsel for Petitioner